SEP 9 2002
OFFICE OF THE CLERK

No. 01-1572

IN THE
SUPREME COURT OF THE UNITED STATES

COOK COUNTY, ILLINOIS,
Petitioner,

-v.-

UNITED STATES *ex rel.* JANET CHANDLER, Ph.D.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* THE CITY OF NEW YORK, THE CITY OF BOSTON, THE CITY AND COUNTY OF SAN FRANCISCO, THE CITY OF CHICAGO, THE CITY OF INDIANAPOLIS, AND THE CITY OF MILWAUKEE IN SUPPORT OF PETITIONER

MICHAEL A. CARDOZO,
Corporation Counsel
Attorney for *Amicus Curiae*
The City of New York
100 Church Street
New York, NY 10007
(212) 788-0999

LEONARD J. KOERNER,*
GAIL RUBIN,
of Counsel.

*Counsel of Record

September 9, 2002

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
121 N. LaSalle Street
Room 600
Chicago, IL 60601
312-744-7764

A. SCOTT CHINN
Corporation Counsel of the
City of Indianapolis
1601 City/County Bldg.
200 E. Washington St.
Indianapolis, IN 46204
317-327-4055

MERITA A. HOPKINS
Corporation Counsel
City of Boston
Law Department
Room 615/City Hall
Boston, MA 02201
617-635-4018

GRANT F. LANGLEY
City Attorney
City of Milwaukee
200 E. Wells St. #800
Milwaukee, WI 53202
414-286-2601

DENNIS J. HERRERA
City Attorney
Office of the City Attorney
City and County of San Francisco
1 Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102
415-554-3853

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT

POINT I

THE FCA'S PUNITIVE REMEDIES ARE INCONSISTENT WITH THE PRESUMPTION AGAINST IMPOSING PUNITIVE DAMAGES ON GOVERNMENTAL ENTITIES..... 6

POINT II

THE TERM "PERSON" WAS NOT PRESUMED TO INCLUDE LOCAL GOVERNMENTS IN 1863 7

POINT III

THE HISTORICAL CONTEXT OF THE FCA INDICATES THAT CONGRESS DID NOT INTEND THE TERM "PERSON" TO INCLUDE LOCAL GOVERNMENTS. 13

CONCLUSION..... 16

TABLE OF AUTHORITIES

Cases **Page**

Bank of the United States v. Deveaux,
5 Cranch 61 (1809) 10

Board of Commissioners v. Aspinwall,
24 How. 376, 65 U.S. 376 (1861)..... 12

City of Newport v. Fact Concerts, Inc.,
453 U.S. 247, 101 S.Ct. 2748 (1981) 4, 6

Cowles v. Mercer County,
7 Wall. 118, 74 U.S. 118 (1869) 10, 12

Louisville R. Co. v. Letson,
2 How. 495 (1844)..... 10

Monell v. Dep't of Soc. Servs.,
436 U.S. 658, 98 S.Ct. 2018 (1978) 5, 10, 11, 12

Paul v. Virginia,
8 Wall. 168, 75 U.S. 168 (1869) 11

Pierson v. Ray,
386 U.S. 547, 87 S.Ct. 1213 (1967) 4

Quern v. Jordan,
440 U.S. 332, 99 S.Ct. 1139 (1979) 11

United States v. Bornstein,
423 U.S. 303, 96 S.Ct. 523 (1976)..... 13

United States ex rel. Chandler v. Cook County,
277 F.3d 969 (7th Cir. 2000),
cert. granted sub nom. Cook County v. United States ex rel. Chandler,
122 S.Ct. 2657 (2002) 1, 5

United States ex rel. Marcus v. Hess,
317 U.S. 537, 63 S.Ct. 379 (1943) 15

Vermont Agency of Natural Resources v. United States ex rel. Stevens,
529 U.S. 765, 120 S.Ct. 1858 (2000) 4, 7, 13, 14

Will v. Michigan Dep't of State Police,
491 U.S. 58, 109 S.Ct. 2304 (1989)..... 11

Constitutional Provisions

U.S. Const. art. IV, §2 11

U.S. Const. art. III 10, 11, 12

Statutes

Act of July 2, 1862, ch. 130, 12 Stat. 503..... 15

Act of Mar. 2, 1863, ch. 67, 12 Stat. 696..... 14

Act of Feb. 25, 1871, §2, 16 Stat. 431 11

Act of Mar. 2, 1887, 24 Stat. 440..... 15

Civil Rights Act of 1871, 42 U.S.C. §1983 ..... 6, 10

Legislative History

Cong. Globe, 37th Cong., 3d Sess. 952 (1863)..... 13

Cong. Globe, 42d Cong., 1st Sess. 752 (1871)..... 10

H.R. Rep. No. 2,
37th Cong., 2d Sess., pt. ii-a (1862) 13, 14

H.R. Rep. No. 49,
37th Cong., 3d Sess. (Mar. 3, 1863) 13

T. Durant, Report to Joint Comm.
on Revision of Laws 2 (1873) 11

Other

George F. Break, *Fiscal Federalism in theUnited States: The First 200 Years, Evolution and Outlook*, in Advisory Comm. on Intergovernmental Relations, The Future of Federalism in the 1980's (July 1981) 15

Roger W. Cooley, *Handbook of the Law of Municipal Corporations* (1914) 8

John F. Dillon, *A Treatise on the Law of Municipal Corporations* (5th ed. 1911) 8, 9

Charles Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion 1864-1888* (1971) 12

James B. Helmer, Jr. & Robert C. Neff, Jr.,
War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the United States ex rel. Gravitt v. General Electric Co. Litigation,
18 Ohio N.U. L. Rev. 35 (1991) 13

Arnold M. Howitt, *Managing Federalism: Studies in Intergovernmental Relations* (1984)..... 15

Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*,
34 Am. U.L. Rev. 369 (1985) 9

No. 01-1572

IN THE
SUPREME COURT OF THE UNITED STATES

COOK COUNTY, ILLINOIS,
Petitioner,

-v.-

UNITED STATES ex rel. JANET CHANDLER, Ph.D.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* THE CITY OF NEW YORK, THE CITY OF BOSTON, THE CITY AND COUNTY OF SAN FRANCISCO, THE CITY OF CHICAGO, THE CITY OF INDIANAPOLIS, AND THE CITY OF MILWAUKEE IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The City of New York, the City of Boston, the City and County of San Francisco, the City of Chicago, the City of Indianapolis and the City of Milwaukee, respectfully submit this brief as *amici curiae* in support of reversal of the judgment of the United States Court of Appeals for the Seventh Circuit in *United States ex rel. Chandler v. Cook County*, 277 F.3d 969 (7th Cir. 2002), *cert. granted sub nom. Cook County v. United States ex rel. Chandler*, 122 S.Ct. 2657 (2002).[1] The Seventh Circuit's determination in

[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no

this case that local governments are amenable to suit under the federal False Claims Act ("FCA") involves a vitally important issue for local governments around the country facing potentially overwhelming liability exposure under the Seventh Circuit's decision. Allowing this decision to stand will subject local governments to the FCA's massive punitive remedies of treble damages plus penalties and will undermine this Court's long-standing presumption that local governments are immune from punitive remedies in the absence of explicit statutory authorization.

The City of New York is a political subdivision of the State of New York that annually receives billions of dollars in federal funds either directly from the United States or through the State for numerous essential municipal services and programs. In some instances, the City of New York is responsible for providing these essential services to its citizens and for implementing these programs, and in other instances, the City is responsible for determining eligibility for these programs. Generally, the federal government and the State of New York disburse the funds and monitor their expenditure.

The City of Boston is a political subdivision of the Commonwealth of Massachusetts. The City and County of San Francisco is a political subdivision of the State of California. The City of Boston and the City and County of San Francisco annually receive significant sums of federal funds either directly from the United States or through the State for essential municipal services and programs.

---

person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief. The filing of this *amici* brief is accompanied by the written consent of all parties.

Subjecting the City of Boston and the City and County of San Francisco to treble damage liability under the FCA would harm local taxpayers who would be called upon to pay those damages, and would also harm the beneficiaries of essential local services, who would face the reduction or elimination of those services to pay those damages.

The City of Chicago is the largest municipality in the Seventh Circuit, which rendered the erroneous decision below. The City of Indianapolis is the largest city in Indiana and is located within the Seventh Circuit. The City of Chicago and the City of Indianapolis are very concerned that if the Seventh Circuit's decision is not reversed, they will be subject to treble damages and attorney's fees under the FCA.

The City of Milwaukee is a political subdivision of the State of Wisconsin. In fiscal 2001, the City of Milwaukee received approximately $50.6 million in federal dollars to either spend or administer primarily for Community Development Block Grants and for public health and law enforcement purposes.

Amici are deeply interested in the outcome of this case. *Amici* submit that, in seeking to combat private military profiteering during the Civil War by enacting the FCA, and in subsequently amending the statute to augment punitive remedies, Congress never intended to burden local taxpayers with treble damages, penalties and a windfall to an individual whistleblower. *Amici* urge the Court to reverse the Seventh Circuit's determination that local governments are "persons" subject to suit under the FCA.

SUMMARY OF ARGUMENT

This case involves battling presumptions governing the interpretation of the word "person" in a *qui tam* suit under the FCA. In concluding that a State is not a "person" under the FCA, this Court held that the treble damages and civil penalties imposed under the FCA were "punitive in nature." *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 784-85, 120 S.Ct. 1858, 1869 (2000). Accordingly, the long-standing "presumption against imposition of punitive damages on governmental entities" counseled against imposing State *qui tam* liability under the FCA. *Id.,* citing *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 101 S.Ct. 2748 (1981). The rationale for this common law protection is that punitive sanctions against governmental entities punish innocent taxpayers, not actual wrongdoers, and subject those entities to undue fiscal constraints. *City of Newport,* 453 U.S. at 259-64, 101 S.Ct. at 2756-58. In *City of Newport,* this Court stated the general rule that, in light of the presumption of municipal immunity, "Congress would have specifically so provided had it wished to abolish the doctrine." *Id.* at 263, 101 S.Ct. at 2758, citing *Pierson v. Ray,* 386 U.S. 547, 555, 87 S.Ct. 1213, 1218 (1967).

Application of the presumption against the imposition of punitive remedies on governmental entities should lead to a similar conclusion in this case: local governments are not "persons" under the FCA.[2] However,

[2] *Amici* address only whether a local governmental entity is a proper *qui tam* defendant, not whether it is a proper *qui tam* relator. *See Stevens,* 529 U.S. at 787 n.18, 120 S. Ct. at 1871 n.18 (leaving open question of whether States can be "persons" for purposes of commencing FCA *qui tam* action after finding that States were not "persons" for purposes of *qui tam* liability).

in holding Cook County amenable to suit under the FCA, the Seventh Circuit rejected this interpretive rule, holding just the opposite: that Congress must specifically indicate its intent to exempt local governments from the FCA's statutory scheme imposing punitive remedies. *United States ex rel. Chandler v. Cook County,* 277 F.3d 969, 979 (7th Cir. 2002). The Seventh Circuit reached this result by presuming that local governments were included within the meaning of the word "person" in 1863. *Id.* at 974. The court below sought to rely for this presumption on *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018 (1978), where this Court found that it was clear by 1871 that "corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell*, 436 U.S. at 687, 98 S.Ct. at 2034. The court below implicitly reasoned that local governments were corporations, and therefore presumed them to be "persons" in accordance with the Circuit Court's reading of *Monell*.

The Seventh Circuit's assumption that in 1863, the word "person" in the FCA included local governments because "corporations" presumptively included local governments, is, however, erroneous. The evolving state of the law regarding the corporate status of local governments in 1863 indicates that Congress would not have presumed that "corporations" included local governments. Moreover, the historical context in which the FCA was enacted demonstrates that Congress was concerned with fraud by private contractors, not local governments. Thus, consistent with *Stevens*, the presumption against the imposition of punitive remedies on governmental entities, combined with the fact that Congress did not envision local governments as "persons" in 1863, dictate that local governments should not be subject to suit under the FCA.

ARGUMENT

I

THE FCA'S PUNITIVE REMEDIES ARE INCONSISTENT WITH THE PRESUMPTION AGAINST IMPOSING PUNITIVE DAMAGES ON GOVERNMENTAL ENTITIES.

In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748 (1981), this Court held that municipalities were immune from punitive damages under the Civil Rights Act of 1871, 42 U.S.C. §1983. In so holding, the Court reviewed the long history of municipal immunity, and reiterated that "[t]he general rule today is that no punitive damages are allowed unless expressly authorized by statute." *Id.* at 260 n.21, 101 S.Ct. at 2756 n.21. The rationale for this common law immunity from punitive remedies is simple: punishment should be imposed only against actual wrongdoers and not against the taxpaying citizens of the community. *Id.* at 261-63, 101 S.Ct. at 2756-58. The presumption against punitive remedies protects "the public from unjust punishment, and the municipalities from undue fiscal constraints." *Id.* at 263, 101 S.Ct. at 2757-58. The Court recognized the serious fiscal consequences of imposing punitive remedies on local governments, stating that the "windfall" to the plaintiff is "likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." *Id.* at 267, 101 S.Ct. at 2760.

In *Stevens*, this Court reiterated the presumption against the imposition of punitive remedies on governmental entities in holding that States are not "persons" subject to suit under the FCA. *Stevens*, 529 U.S. at 784-85, 120 S.Ct. at 1869-70. The Court specifically rejected the argument that *City of Newport* was inapplicable in the context of the FCA, reading *City of Newport* to mean that the Court was "concerned with imposing punitive damages on taxpayers under any circumstances." *Id.* at 785 n.15, 120 S.Ct. at 1869 n.15. Further, this Court explicitly found that the FCA remedy of treble damages plus civil penalties is, in fact, "punitive in nature." *Id.* at 784, 120 S.Ct. at 1869.

The presumption of governmental immunity from such punitive remedies as appear in the FCA is rebutted only if Congress explicitly so provides. Because there is no such explicit congressional instruction here, the presumption of governmental immunity mandates a finding that local governments are not "persons" under the FCA.

II

THE TERM "PERSON" WAS NOT PRESUMED TO INCLUDE LOCAL GOVERNMENTS IN 1863.

This Court in *Stevens* held that, because the term "person" in the FCA "has remained in the statute unchanged since 1863," it is the intent of the 1863 Congress that should be analyzed, not the 1986 amendments to the statute. *Stevens*, 529 U.S. at 783 n.12, 120 S.Ct. at 1868 n.12. The Court in *Stevens* also noted that corporations are presumptively covered by the term "person." *Id.* at 782, 120 S.Ct. at 1868. Hence, the

pertinent question here is whether, in 1863, it was so clear that the term "corporation" included local governments that Congress would have presumed "person" as used in the FCA to have included local governments.

An analysis of treatises on local government establishes that local governments would not likely have been presumptive "corporations" in 1863. While "municipal corporations" -- "duly incorporated not primarily to enforce state laws, but chiefly to regulate the local affairs of the city, town or district incorporated by proper legislation and administration" -- did exist, many local governments were not "municipal corporations" in 1863. Roger W. Cooley, *Handbook of the Law of Municipal Corporations* 15 (1914). A local government might also take the form of a "quasi-corporation," which was not in fact a "corporation," but "an almost corporation." *Id.* at 12-13. Depending on state law, quasi-corporations included counties, townships, school districts, road districts, public commissioners, boards of supervisors, school trustees and the like. *Id.* at 494-95. Quasi-corporations were not only not real corporations, they were exempt from the "general law of corporations." *Id.* at 496 ("Subject to statutory regulation, there are, of course, certain peculiar qualities and attributes common to all quasi corporations, which distinguish them from municipalities, and exempt them from the general law of corporations.").

There were significant differences between "municipal corporations" and "quasi-corporations." "Municipal corporations" were given corporate capacity at the request of or with the consent of the inhabitants, while "quasi-corporations" were mere subdivisions of the State. 1 John F. Dillon, *A Treatise on the Law of Municipal Corporations* §10 p. 30-33 (1872). Depending on state

law, "municipal corporations" would be liable for their torts, but "quasi-corporations" would not be liable unless made so by express legislative enactment. *Id.* at 33. A local government that was a "municipal corporation" in one State may have been a "quasi-corporation" in another State.

State law governing the corporate nature of local governments developed differently in different States in the first half of the nineteenth century. In New York, for example, which followed English law, only a chartered borough could be a corporation -- so towns were not corporations. Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 Am. U.L. Rev. 369, 372, 392-93 (1985). Even towns and villages which were incorporated by statute were distinguished from chartered boroughs, which were the "real" corporations. *Id.* at 400, 392-410. Towns and villages might be "quasi corporations" or they might be "corporations for a particular purpose," but they were not "real" corporations. *Id.* at 403-10. By contrast, in Massachusetts, courts early on held that New England towns were a new type of "municipal" corporation. *Id.* at 410-14.

In 1863, there simply was no uniform national consensus on the legal status of local governments as "corporations," as reflected by the variability of state laws and the differing assumptions concerning local governments, cities, towns, counties and other public entities. The absence of a uniform understanding of the status of local governments in 1863 makes it highly unlikely that Congress simply presumed that the term "corporation" would include local governments.

As support for its position that local governments were presumed to be corporations and hence "persons" under the FCA, the Seventh Circuit relied on this Court's statement in *Monell* that "by 1871, it was well understood that corporations should be treated as natural persons . . . ." 436 U.S. at 687, 98 S.Ct. at 2034. However, the Seventh Circuit failed to note the Court's distinction between private corporations and municipal corporations. *Id.* at 688, 98 S.Ct. at 2034. While it is true that the "*Deveaux* doctrine," denying that private corporations were "citizens" as that term was used in Article III and the Judiciary Act of 1789, had been abandoned by 1844, *id.* at 687-88, 98 S.Ct. at 2034, citing *Louisville R. Co. v. Letson*, 2 How. 495, 558 (1844) and *Bank of the United States v. Deveaux*, 5 Cranch 61, 86 (1809), no such understanding had been reached with respect to municipal corporations. Indeed, this Court in *Monell* was quite clear that the principle of treating corporations as persons was not "automatically without discussion extended to municipal corporations" until 1869, six years *after* the FCA was enacted. *Monell*, 436 U.S. at 688, 98 S.Ct. at 2034, citing *Cowles v. Mercer County*, 7 Wall. 118, 121, 74 U.S. 118 (1869). This period of uncertainty concerning the status of corporations was noted in the debates over the Civil Rights Act of 1871. *See* Cong. Globe, 42d Cong., 1st Sess. 752 (1871) (Rep. Shellabarger) ("[Counties], cities, and corporations of all sorts, *after years of judicial conflict*, have become thoroughly established to be an individual or person or entity of the personal existence, of which, as a citizen, individual or inhabitant, the United States Constitution does take note and endow with faculty to sue and be sued in the courts of the United States")(emphasis supplied), cited in *Monell*, 436 U.S. at 688 n.50, 98 S.Ct. at 2034 n.50.

Further, even this Court's 1844 decision that private corporations were "citizens" of a State within the meaning of the jurisdictional provisions of Art. III did not mean that corporations were to be treated as "persons" for all purposes or were presumptive "persons" for purposes of statutory construction. For example, in 1869, the Court held that private corporations were not "citizens" within the meaning of the Privileges and Immunities Clause, U.S. Const. art. IV, § 2. *Paul v. Virginia*, 8 Wall. 168, 75 U.S. 168 (1869). Congress itself did not create a statutory presumption that the word "person" included "bodies politic and corporate" until the 1871 Dictionary Act, which so presumed "unless the context shows that such words were intended to be used in a more limited sense." Act of Feb. 25, 1871, §2, 16 Stat. 431. Because the FCA was enacted in 1863, eight years prior to the 1871 Dictionary Act, the statutorily-created presumption could not have applied to the FCA. *See Quern v. Jordan*, 440 U.S. 332, 341 n.11, 99 S.Ct. 1139, 1145 n.11 (1979) (Dictionary Act presumption inapplicable to 1871 Civil Rights Act when it came more than five years after passage of the Civil Rights Act of 1866, which served as the model). Even this congressional presumption was short-lived, as the Dictionary Act was amended in 1874 to eliminate the definition. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 81, 109 S.Ct. 2304, 2318 (1989)(Brennan, J. dissenting)(citing T. Durant, Report to Joint Comm. on Revision of Laws 2 (1873)).

Nor is the enforcement by the federal courts of the Contract Clause against municipal corporations in municipal bond cases as early as 1861 a sufficient basis from which to conclude that Congress would have presumed the term "person" in the FCA to include local governments. *See, e.g., Board of Commissioners v.*

Aspinwall, 24 How. 376, 65 U.S. 376 (1861), cited in *Monell*, 436 U.S. at 673 n.28, 98 S.Ct. at 2027 n.28. First, even in *Monell*, this Court did not date the presumption that municipal corporations were persons for Art. III purposes from the *Aspinwall* decision, but rather from the 1869 decision of *Cowles v. Mercer County*, 7 Wall. 118, 74 U.S. 118 (1869). *See Monell*, 436 U.S. at 688, 98 S.Ct. at 2034. The Supreme Court in *Cowles* recognized that the question "whether the board of supervisors of Mercer County can be sued in the Circuit Court of the United States by citizens of other States than Illinois" was the only question presented by the case "which has not been heretofore fully considered and repeatedly adjudicated." *Cowles*, 74 U.S. at 121. Thus, despite the *Aspinwall* line of cases, the Supreme Court in 1869 believed that the Art. III question was not then fully settled.

Second, in cases such as *Aspinwall*, the Supreme Court declared a "special rule" involving a municipal corporation's obligation to honor bonds issued in support of railroads, a rule which was subject to resistance in the States and the state courts for many years. *See* VI Charles Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion 1864-1888*, ch. XVII, at 947, and 918-1009 (1971). The wide-ranging defiance in the States, *id.*, makes it unlikely that Congress in 1863 used these particular cases to presume anything about the corporate status of local governments.

The Seventh Circuit was accordingly mistaken in reading *Monell* as supporting a presumption that local governments were considered "corporations" or "persons" at the time of the enactment of the FCA in 1863. Given the evolving state of the law at the time regarding local governments, there simply was no such presumption.

III

THE HISTORICAL CONTEXT OF THE FCA INDICATES THAT CONGRESS DID NOT INTEND THE TERM "PERSON" TO INCLUDE LOCAL GOVERNMENTS.

This Court has already observed that, "As the historical context makes clear, and as we have often observed, the FCA was enacted in 1863 with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" *Stevens*, 529 U.S. at 781, 120 S.Ct. at 1867, quoting *United States v. Bornstein*, 423 U.S. 303, 309, 96 S.Ct. 523, 528 (1976). In 1863, the Congress of the United States was receiving "alarming reports from the battlefield. These reports concerned Union soldiers opening crates of muskets only to find them filled with sawdust instead of arms. Reports of the same horses and mules being sold to the United States cavalry three and four times further demonstrated a serious problem with war profiteers." James B. Helmer, Jr. & Robert Clark Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the United States ex rel. Gravitt v. General Electric Co. Litigation*, 18 Ohio N.U. L. Rev. 35 (1991) (citations omitted). Abuses were being committed by contractors, suppliers, railroads, sutlers and even military officers in connection with the war effort. *See generally* H.R. Rep. No. 2, 37th Cong., 2d Sess., pt. ii-a (1862) ("1862 House Rep."); H.R. Rep. No. 49, 37th Cong., 3d Sess. (Mar. 3, 1863) ("1863 House Rep."); Cong. Globe, 37th Cong. 3d Sess. 952-58 (1863).

The legislative history gives no hint of abuses by state or local governments. The 1862 House Report, which was not prepared in connection with the 1863 FCA or in connection with any proposed false claims legislation, mentioned States only twice: once, as victims of fraud in their role as purchasers of military supplies, 1862 House Rep. at XXXVIII; *see Stevens*, 529 U.S. at 783 n.12, 120 S. Ct. at 1868 n.12; and a second time, as market competitors with the federal government for military supplies from foreign suppliers. 1862 House Rep. at LXXVIII. Local governments are not mentioned at all in any of the legislative materials, either in connection with "abuses" or with government contracts.

Nor is it likely that members of Congress in 1863 would presume that a statute addressing "any claim upon or against the Government of the United States" for "payment or approval" would apply to local governments. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. First, by contrast to the shoemakers, tent pole makers, blanket, and horse and mule suppliers described by Congress as involved in war profiteering, there is nothing in the historical record to indicate that local governments served as suppliers or contractors to the Government of the United States during the Civil War. *See* 1862 House Rep. *passim*. Since there was no custom or practice of federal-local contracting, it is unlikely that Congress would have envisioned a local government submitting a "claim for payment or approval" to the Government of the United States.

Second, federal fiscal contributions even to the States were extremely limited in the mid-nineteenth century, and primarily took the form of land grants, which were regarded as "'gifts' of the federal government and subject to no legally binding constraints." George F.

Break, *Fiscal Federalism in the United States: The First 200 Years, Evolution and Outlook*, *in* Advisory Commission on Intergovernmental Relations, The Future of Federalism in the 1980s, at 41 (July 1981) ("*Fiscal Federalism*"). *See also* Arnold M. Howitt, *Managing Federalism: Studies in Intergovernmental Relations* 4 (1984) ("*Managing Federalism*"). It was only in the Morrill Act of 1862, supporting education in the agricultural and mechanical arts, that Congress established the first land grant program to the States that had any accountability requirements. Act of July 2, 1862, ch. 130, 12 Stat. 503. Not until 1887, in the Hatch Act, did Congress provide for annual cash grants to the States, in support of agricultural experiment stations, and attach compliance requirements. Act of Mar. 2, 1887, 24 Stat. 440; *Fiscal Federalism* at 43; *Managing Federalism* at 4. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544, 63 S. Ct. 379, 384 (1943)(at the time of the passage of the FCA, federal aid to States consisted primarily of land grants).

In 1863, Congress was just beginning to envision the possibility of attaching conditions to state land grants. As for local governments, there do not appear to have been any conditional grants, or grants of any kind. Thus, there was little chance that Congress had local governments in mind when discussing "claims for payment or approval" submitted to the federal government.

CONCLUSION

For all of the above reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for *Amicus Curiae*
The City of New York
100 Church Street
New York, New York 10007
212-788-0995

LEONARD J. KOERNER*
GAIL P. RUBIN
*Counsel of Record

OTHER AMICI

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
121 N. LaSalle Street
Room 600
Chicago, IL 60601
312-744-7764

A. SCOTT CHINN
Corporation Counsel of the
City of Indianapolis
1601 City/County Bldg.
200 E. Washington St.
Indianapolis, IN 46204
317-327-4055

MERITA A. HOPKINS
Corporation Counsel
City of Boston
Law Department
Room 615/City Hall
Boston, MA 02201
617-635-4018

GRANT F. LANGLEY
City Attorney
City of Milwaukee
200 E. Wells St. #800
Milwaukee, WI 53202
414-286-2601

DENNIS J. HERRERA
City Attorney
Office of the City Attorney
City and County of San Francisco
1 Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102
415-554-3853